

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 39310

LAKEWOOD, OHIO, CONGREGATION

APPEAL FROM

OF JEHOVAH'S WITNESSES, INC.

APPELLANT

COMMON PLEAS COURT

-VS-

No. 941,446

CITY OF LAKEWOOD, ET AL.

JOURNAL ENTRY

AND

APPELLEES

OPINION

DATE MAY 17 1979

PATTON, J.:

Plaintiff appeals from the judgment of the trial court overruling its motion for summary judgment and granting summary judgment for defendants. For reasons which appear below, this court finds it necessary to remand this cause for further proceedings.

This case has an extremely long procedural history. In 1971, plaintiff applied for but was denied a permit to build a church. That administrative decision was appealed to the Court of Common Pleas, which affirmed the Board of Zoning Appeals action. The plaintiff appealed to this court, which also affirmed the decision.^{1/}

In July, 1973, the City of Lakewood changed the zoning ordinance involved. In April, 1975, plaintiff applied to the city for a permit under the new ordinance. The permit was denied.

^{1/} In Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood (Ct. App. Cuy. Cty., March 21, 1974), No. 32386, the Ohio Supreme Court overruled a motion for certification.

Plaintiff appealed to the Court of Common Pleas, alleging that the ordinance was unconstitutional (1) on its face and (2) as applied to plaintiff. The plaintiff filed a motion for summary judgment based upon the ground that the ordinance was unconstitutional on its face (it did not request summary judgment upon the ground that the ordinance was unconstitutional as applied). Defendant opposed the motion for summary judgment, arguing that summary judgment could not be granted because the outcome in a zoning situation depends on the facts of each case. Thus, the matter would have to proceed to trial to determine the pertinent facts.^{2/} Secondly, defendant argued that churches are allowed in some residential districts, and a municipality, pursuant to its police power, has the authority to determine what will be permitted. In addition, defendant filed a counter-motion for summary judgment based upon res judicata. Defendant asserted that the earlier litigation prevented plaintiff from bringing a second action based upon essentially the same matter.

The trial court granted defendant's motion for summary judgment. It held that the ordinance was constitutional as applied to plaintiff based on the former action. The court specifically stated that it was not ruling on the constitutionality of the ordinance as a whole (on its face).

In February, 1977, this court reversed the decision of the lower court holding that the action was not barred by the doctrine of res judicata.^{3/}

2/ As far as this first ground for opposing plaintiff's motion is concerned, defendant obviously confused plaintiff's allegations in its motion for summary judgment. Defendant responded as though plaintiff requested summary judgment on the issue of unconstitutionality of the ordinance as applied to plaintiff. As noted in the text, plaintiff moved only for summary judgment on the ground that the ordinance was unconstitutional on its face. Such is a question of law and not dependent on the facts of each case.

3/ Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood (Ct. App. Cuy. Cty., Feb. 3, 1977), No. 36452. This court viewed the issues in the second controversy to be different from those in the first since: (1) the traffic patterns, which had played a major role in the initial litigation, may have changed and (2) the second suit was based on a different ordinance.

The effect was to reverse the lower court's granting of summary judgment for defendant and remand the case for further proceedings. As below, this court dealt only with the ordinance as applied to plaintiff.

Upon remand, the plaintiff's motion for summary judgment was still before the court. In July, 1977, the court overruled plaintiff's motion for summary judgment. Eighteen days later, plaintiff filed a "motion for reconsideration". In April, 1978, the trial court granted plaintiff's motion to reconsider and sua sponte decided to reconsider defendant's motion for summary judgment as well. However, no motion for summary judgment for defendant existed at that time -- defendant's only motion for summary judgment was based upon res judicata and had been previously granted by the lower court, then reversed by this court.^{4/} There were no assertions other than res judicata to support defendant's original motion,^{5/} and after remand, defendant filed no new motions.

The trial court reviewed the briefs submitted by both parties and denied plaintiff's motion and granted summary judgment for defendant. The court noted that the judgment was final and that there was no just reason for delay. This judgment, too, was only a partial judgment in that it concerned only the constitutionality of the ordinance on its face and not as applied to plaintiff. Thus, the question of the constitutionality of the ordinance as applied to

4/ See n. 3 and accompanying text, supra.

5/ Defendant had filed a motion in response to plaintiff's motion for summary judgment setting forth two reasons why plaintiff's motion should not be granted (see text). The portion of that pleading which requested summary judgment for defendant, however, was based only on the theory of res judicata.

plaintiff is still technically before the trial court.^{6/}

This court is of the opinion that the court improperly granted summary judgment for defendant since no motion for summary judgment for defendant was pending. Therefore, the court only ruled on plaintiff's motion for summary judgment, which it denied. This left the issue raised in that motion (the constitutionality of the ordinance on its face) not fully disposed of. It left the issue in a position to be heard and tried on the merits.

Since the issue was not fully disposed of, this court has no authority to review the court's denial of plaintiff's motion for summary judgment. The fact that the lower court stated that the order was final and that there was "no just reason for delay" is of no consequence because the trial court was under the false impression that it not only had denied plaintiff's motion on the issue but had granted defendant judgment on the issue, thus fully disposing of the question. As we have stated, the court erred in that regard and the issue has, in fact, not been fully disposed of.

This court is remanding the case to the trial court for further proceedings in the case as it stood after the denial of plaintiff's motion for summary judgment. The court must, therefore, make a proper final determination with respect to the issue of the constitutionality of the ordinance as a whole. The trial court is also directed to determine the issue of the constitutionality of the ordinance as applied to plaintiff which is still pending before it.

^{6/} Since the trial court noted that there was "no just reason for delay", the matter ruled upon is properly before this court, although not all issues, specifically the constitutionality of the ordinance as applied, were disposed of by the lower court. Civ. R. 54(B).

A resolution of the latter issue is not susceptible to a summary judgment determination. As this court noted in its 1977 opinion, circumstances may have changed, particularly with regard to traffic patterns, which would warrant a different result than the related 1972 case.

Therefore, this cause is remanded for further proceedings. The trial court is directed to finally resolve all remaining issues in this case, carefully taking into account all relevant evidence.

RECEIVED FOR FILING

MAY 17 1979

GERALD E. FUERST
Peggy Maguire

This cause is remanded to the Common Pleas Court for further proceedings
consistent with this opinion.

It is ordered that costs are to be divided equally between the parties.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of
Appellate Procedure. Exceptions.

JOURNALIZED JUN 14 1979

GERALD E. FUERST, Clerk of Courts

By *Peggy Maguire* Deputy

STILLMAN, P.J.,

DAY, J., CONCUR.

John T. Patton

JUDGE

JOHN T. PATTON

For plaintiff-appellant: Robert J. Valerian,

For defendants-appellees: Thomas M. Kennedy, Jr.,
Asst. Law Director.

This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an
interim decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate
finalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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ALL PARTIES. - COSTS TAXED.

The State of Ohio, } ss.
CUYAHOGA COUNTY

I, GERALD E. FUERST, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal Ob 100 Pg 972 dated May 17 1979 - Case 3931 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Ob 100 Pg 972 dated May 17 1979 and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially,

and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 5th

day of August A. D., 19 83

GERALD E. FUERST, Clerk of Courts

By Eileen Demas Deputy Clerk

